Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

OWEN C. JARVIS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

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October 1994

25 pp

QUESTION PRESENTED

Whether the Addendum to the Staff Judge Advocate's Recommendation was unduly prejudicial in that it stated appellant "waived" certain issues for consideration by the convening authority.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Owen C. Jarvis, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on 20 July 1994.

OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals, dated 20 July 1994, USCMA Docket No. 93-0671/AF, is located at Appendix A. The unpublished opinion of the United States Air Force Court of Military Review, ACM 29456, A.F.C.M.R. 9 February 1993, affirming the conviction is reported at Appendix B.

JURISDICTION

The final order of the United States Court of Military Appeals was entered on 20 July 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1992) and 10 U.S.C.A. § 867(a) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Petitioner was the subject of an OSI investigation that was initiated at Pease Air Force Base, New Hampshire, and subsequently transferred to Hickam Air Force Base, Hawaii. Petitioner's 10 year old step daughter, Jacqueline C. Small, accused him of various acts of sexual abuse during the time that she and her mother, Barbara Jarvis, lived with petitioner on Hickam Air Force Base, Hawaii, from about 1 May 89 to about 1 Sep 89. Petitioner emphatically denied sexual abuse of Jacqueline but told the OSI of four encounters with Jacqueline that could have been interpreted by her as being sexual. Petitioner believed the allegations were the product of Jacqueline's mother, Barbara, who, as a result of marital bitterness, was attempting to preclude petitioner from gaining custody of or seeing Barbara's and petitioner's natural children, two young boys. Jacqueline was abused by her natural father when she was very young and suffered from a variety of emotional and behavioral problems.

On 9-13 April 1991, petitioner was tried by general court-martial. He was charged with three specifications of indecent acts with a female under 16 years of age and one specification of indecent liberties with a female under 16 years of age. Contrary to his pleas, the petitioner was convicted of all four specifications.

The petitioner was sentenced to a bad conduct discharge, three years confinement, and reduction to the lowest enlisted grade. On 19 July 1991, the convening authority approved the findings and sentence as adjudged.

The Addendum to the Staff Judge Advocate's Recommendation dated 18 July 1991 states:

> In paragraph 37 of Sgt Jarvis' statement regarding clemency and in paragraphs 30 and 31 of the response submitted by his counsel the assertion is made that Sgt Jarvis had been restricted to Oahu and thus had suffered a significant restraint on his liberty from August 1989 until the time of trial in April 1991. My review of the record in this case reveals that this is the first time this claim has been made. *Accordingly, any possible claim that this "restraint" should result in a credit against confinement has been waived by the accused.*

Allied Papers, Addendum to the Staff Judge Advocate's Recommendation, 18 Jul 91, paragraph 3.

On appeal to the Air Force Court of Military Review, petitioner claimed, among other things, that the Staff Judge Advocate improperly informed the convening authority that the petitioner had waived the issue of restraint and failed to address the matters raised by the defense on this issue in the Addendum.

The Air Force Court of Military Review found no error in the Staff Judge Advocate's recommendations to the convening authority and affirmed the findings and sentence on 9 February 1993.

On 20 July 1994, the United States Court of Military Appeals granted review of the Air Force Court's decision and summarily affirmed, thereby preserving this issue for review by this Honorable Court.

REASONS FOR GRANTING THE WRIT

Waiver is a legal matter for trial and appellate judges. It has no place in clemency considerations. R.C.M. 1105(b) states "[t]he accused may submit to the convening authority *any* written matters which may reasonably tend to affect

the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence." (Emphasis added). That petitioner had been restricted to the island since August of 1989 is a significant matter which should have affected the convening authority's decision about the sentence in appellant's case. His sentence to three years confinement essentially was one to 4 years and 8 months.

Approval of a court-martial sentence with its attendant clemency decision is a matter solely within the discretion of the convening authority. *United States v. Spurlin,* 33 M.J. 443 (C.M.A. 1991), *citing,* Art. 60(c)(1), U.C.M.J., and *United States v. DeGrocco,* 13 M.J. 146 (C.M.A. 1987). A convicted service member's best hope for sentence relief lies with the convening authority. *United States v. Bono,* 26 M.J. 240, 243 n.3 (C.M.A. 1988), *citing United States v. Wilson,* 9 U.S.C.M.A. 223, 226, 26 C.M.R. 3, 6 (1958). "Absent some waiver by the defense, a staff judge advocate has an obligation to provide correct information to the convening authority, for there can be no justice, no due process of law, where a convening authority is substantially misled as to fact or law." *United States v. Dowell,* 15 M.J. 351, 353 (C.M.A. 1983). Petitioner could have no hope for sentence relief when the convening authority was told he need not consider petitioner's 20 month pre-trial restriction.

CONCLUSION

The petitioner simply sought for the return of his record for a new Addendum to the Staff Judge Advocate's Recommendation and a new Convening Authority's Action. Unless and until this Court grants this writ, the petitioner will find no meaningful relief.

Respectfully submitted,

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October 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 93-0671/AF
CMR Dkt. No. 29456

UNITED STATES, APPELLEE

v.

OWEN C. JARVIS (043-68-6483), APPELLANT

ORDER

On further consideration of the granted issue (38 MJ 457), we are satisfied that there has been no error prejudicial to appellant's substantial rights. Art. 59(a), Uniform Code of Military Justice, 10 USC § 859(a). Accordingly, it is, by the Court, this 20th day of July, 1994

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,
/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (MOUL)
Appellate Government Counsel (SILBERBERG)

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 29456

UNITED STATES

v.

SERGEANT OWEN C. JARVIS, FR043-68-6483
UNITED STATES AIR FORCE

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9 February 1993

Sentence adjudged 13 April 1991 by GCM convened at Hickam Air Force Base, Hawaii. Military Judge: Kevin L. Daugherty.

Approved sentence: Bad-conduct discharge, 3 years confinement, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens and Captain Ursula P. Moul.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., and Captain Carlos L. McDade.

Before

LEONARD, JAMES, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

JOHNSON, Judge:

Sergeant Jarvis was convicted of committing two indecent acts and taking indecent liberties with his 9-year-old stepdaughter.[1] He assigns several errors before us, none of which warrants relief. We affirm.

CONVENING AUTHORITY

The defense moved at trial for appropriate relief in the form of dismissal of the charges, or in the alternative that the convening authority be disqualified from taking any further action. Appellant assigns as error that the military judge denied this motion. The basis for the motion was an argument that the convening authority disqualified himself by reviewing the available evidence and receiving advice and recommendations as to disposition of the case from his staff judge advocate, agents of the Air Force Office of Special Investigations (OSI), and appellant's squadron commander.

The convening authority had before him charges preferred by appellant's squadron commander and a request submitted by appellant for an administrative discharge in lieu of trial by court-martial.[2] After discussing the case with the deputy staff judge advocate (who recommended the convening authority accept appellant's request for discharge in lieu of trial) and an OSI agent (who recommended trial by court-martial), the convening authority reviewed the OSI report of investigation concerning appellant and watched a videotaped interview of the alleged victim. He then met for further discussion with his staff

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[1] Article 134, UCMJ; MCM, Part IV, paragraph 87 (1984).

[2] *See* Chapter 4, Air Force Regulation 39-10, *Administrative Separation of Airmen*, 1 April 1988.

judge advocate, OSI agents, and appellant's squadron commander. He ultimately decided to disapprove appellant's request for administrative discharge in lieu of trial and appointed an Article 32 investigating officer. Later, based on the results of the Article 32 investigation, he referred the charges to trial by general court-martial.

The military judge understood the defense motion for appropriate relief to be based on the theory that the convening authority had become so involved in investigation of the case to make him an accuser, which would disqualify him from acting as convening authority under R.C.M. 601(c). He properly rejected this argument, having found that the convening authority simply performed normal and appropriate convening authority functions under R.C.M. 601(d). There is no indication in the record that the convening authority had a personal interest, rather than an official one, that would make him an accuser. *United States v. Conn,* 6 M.J. 351, 354 (C.M.A. 1979).

Appellant takes a different tack before us, arguing that the convening authority acted improperly because he referred the charges to an Article 32 investigating officer without giving the defense an opportunity to be heard. No authority is cited for this proposition, other than the assertion that an appearance of impropriety was created. We reject the notion that convening authorities must affirmatively offer the defense an opportunity to be heard before referring charges to an Article 32 investigation. Accused persons are specifically informed of their rights to submit matters on their own behalf at various stages of the court-martial process, most notably at the Article 32 investigation and at trial. In addition, the defense can submit matters on its own initiative any time it elects to do so. Convening authorities should of course consider all matters submitted by the defense in making any decisions relating

to military justice. There is no claim in this case that the defense submitted any matter for consideration by the convening authority, or that it had sought to do so. We find no error, and there is no indication of any prejudice to appellant.

Appellant also argues the convening authority should be disqualified from taking action on the findings and sentence because he knew so much about appellant (including references in the OSI report of investigation to uncharged incidents of physical abuse of members of his family) that he could not be impartial in weighing clemency considerations. Again, no authority is cited for this proposition. Convening authorities, courts of military review, clemency and parole boards, and other post-trial reviewing officials are expected to review the entire record, including allied papers not admitted into evidence at the trial, and to give appropriate weight to all of it. R.C.M. 1106(d)(5) provides specifically that the staff judge advocate's post-trial recommendation may include matters outside the record. So long as the accused has an opportunity to be heard in his own behalf as to any such matters, there is no error. *See United States v. Narine,* 14 M.J. 55 (C.M.A. 1982); *United States v. Komorous,* 33 M.J. 907 (A.F.C.M.R. 1991).[3]

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[3] These three arguments for disqualification of the convening authority lack any legal foundation, and they show profound misunderstanding of the role of the convening authority in the administration of criminal law under the Uniform Code of Military Justice. They are so entirely lacking in merit that we are sorely tempted to label them frivolous.

We forebear only because we acknowledge that a novel theory may on first appearance seem insupportable, and we encourage serious exploration and development of the law. However, counsel are reminded that they must establish in their pleadings that they have made competent inquiry into the law of an issue and demonstrate the good faith basis for their argument for an extension, modification, or reversal

DISCOVERY

Appellant next argues the military judge erred to his prejudice by denying his motion at trial to compel discovery of the bank records of appellant's estranged wife in order to rebut an expected claim by her that appellant had not provided adequate financial support to his family. The bank records in issue were not in the possession of the Air Force, but they presumably could have been obtained by a subpoena issued in compliance with the Financial Right to

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of existing law. ABA Model Rules of Professional Conduct, rules 1.1 (competence) (commentary re: "thoroughness and preparation"), 3.1 (meritorious claims); *accord* Air Force Rules of Professional Conduct, rules 1.1, 3.1 (4 December 1989). Only by so doing may counsel distinguish a serious and well prepared argument for a change in law from an ill considered and perhaps frivolous waste of the time of the Court and one's professional colleagues.

Counsel who contend for a change in law must be equally mindful of the forum in which they argue. Military criminal law is statutory. Most procedural and evidentiary matters in military criminal law are covered by rules of procedure and evidence written by the President pursuant to authority delegated to him by Article 36(a), UCMJ. Many constitutional interpretations and considerations of military due process have already been addressed in the code's 42-year lifespan by decisions of the Court of Military Appeals. Except for the regulation of practice immediately before this Court, we have very little law-making or law-changing authority. Counsel who wish to contend for a change in the statute must go to Congress. Those who contend that a rule would work better if it were different must go to the President. We must follow decisions of the Court of Military Appeals that govern an issue, and counsel who wish to change the result need not start by persuading us and only waste time doing so. When counsel make a novel argument to us, they need to show us in their pleadings that we have the authority to grant the relief they ask on the theory they argue. Otherwise what seems to counsel to be an inventive approach to an interesting problem is really only a poorly thought out exercise in futility—a frivolous assignment.

Privacy Act.[4] The military judge found the bank records were relevant only to collateral matters, the substance of which could probably be established by cross-examination of Mrs. Jarvis, and whose significance did not outweigh the time, effort, and expense of obtaining the records. Since the issue of appellant's financial support of his dependents was not directly relevant to any charged offense, and since Mrs. Jarvis was expected to testify, these findings were supported by the known facts. In the event, the issue of financial support was not raised before the members.

Defense discovery requests are generally governed by R.C.M. 701, which focuses on material in the control of the government, and R.C.M. 703, which authorizes the issuance of subpoenas to obtain material requested by the defense that is not within the government's control. In either case, in order to obtain discovery the defense must make a prima facie showing of materiality. The test for materiality is not just relevance, but "some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor." *United States v. Branoff,* 34 M.J. 612 (A.F.C.M.R. 1992), *pet. granted,* 36 M.J. ____ (C.M.A. 25 November 1992), *quoting United States v. Ross,* 511 F.2d 757, 763 (5th Cir. 1975), *cert. denied,* 423 U.S. 836 (1975). We will review the military judge's decision only for abuse of discretion. *Id.* After careful review of the circumstances of appellant's trial, we find no abuse of discretion. Further, there is no indication appellant suffered any prejudice from lack of access to Mrs. Jarvis' bank records.

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[4] 12 U.S.C. §§ 3401-22 (1988, Supp. I 1989 and Supp. II 1990). *See generally United States v. Wooten,* 34 M.J. 141 (C.M.A. 1992).

DENIAL OF CONTINUANCE

Despite the best efforts of all concerned, a lengthy case file concerning the victim compiled by the Connecticut Department of Children and Youth Services was not received until just before trial. It was provided to defense counsel on the afternoon before the trial convened. The defense moved for a continuance so it could analyze the contents of this file and follow up on various references within it to state agencies and counselors in Connecticut and Maine. The military judge denied the motion for a continuance. Appellant argues the denial of a continuance was error.

The evidence against appellant consisted of the testimony of the victim and certain admissions by appellant to OSI interviewers. The primary defense strategy was to impeach the victim by showing that she was an unreliable witness due to the effects of prior sexual abuse by her natural father, learning disabilities, personality disorders, and an unusually strong desire to please her mother, who herself suffered from personality disorders and had several motives to coach the victim to give false testimony against appellant. The primary witness for the defense was a child psychiatrist who had studied the available records concerning the victim and her mother and had interviewed them on several occasions.

The military judge found the defense was able to present its theory of the case with the information already available and that the existence of additional information helpful to the defense was merely speculative. He also found several witnesses had traveled from the mainland to Hawaii for the trial, and granting a continuance would work a hardship upon them and result in additional expense. The trial was delayed several times for various reasons, and the current trial date was set for a time when

the victim was on spring break from school. He noted the victim was reluctant to testify, and counsel for both sides agreed she might refuse to testify at all if a further continuance was granted. This would deprive the government of her testimony as evidence, and it would deprive the accused of his right of confrontation if the victim's testimony from the Article 32 investigation was admitted at trial as a substitute for her live testimony. After balancing these interests, the military judge denied the motion for continuance.[5]

The decision to grant or deny a continuance is a matter entrusted to the military judge's discretion, based on the facts and circumstances existing at the time of the ruling. *United States v. Maresca,* 28 M.J. 328, 333 (C.M.A. 1989); *United States v. Stevens,* 27 M.J. 626 (A.F.C.M.R. 1988), *aff'd,* 28 M.J. 159 (C.M.A. 1989), *cert. denied,* 490 U.S. 1091 (1989). The military judge's findings and ruling in this case are well supported by the evidence. We concur with his view that the probable effect of a continuance on the continuing availability of a key witness was of special importance. With the information it already possessed, the defense was able to make a forceful presentation of its theories attacking the credibility of the victim witness. We

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[5] There was no discussion at trial of other possible remedies such as permitting the trial to proceed through the prosecution's case in chief and then recessing the trial so the defense could follow up leads in the social services report before presentation of the defense case in chief. This may not have been practical due to factors such as the government's desire to have certain prosecution witnesses available for rebuttal or sentencing testimony, or a defense desire to have the fruits of their further research available during the cross-examination of prosecution witnesses. Since none of the parties proposed such a procedure, there is no discussion in the record of whether this would have been a preferable remedy. We remind counsel and military judges that creativity may be required to best promote justice.

conclude the military judge did not abuse his discretion when he denied the motion for a continuance.

COMPETENCY OF CHILD WITNESS

Appellant next argues the victim was not competent to testify as a witness against him because she failed to take an oath or affirmation to testify truthfully, as required by Mil. R. Evid. 603 and R.C.M. 807(b). This issue was waived by the failure of the defense to raise any objection on this basis at trial. Mil. R. Evid. 103(a). In any event, the extensive colloquies in this case between the witness, the military judge, the trial counsel, and defense counsel adequately demonstrate she knew the difference between truth and falsity, and that she intended to tell the truth. *United States v. Morgan,* 31 M.J. 43 (C.M.A. 1990), *cert. denied,* 499 U.S. ____, 111 S.C. 959 (1991).

PRETRIAL ADMISSIONS

Appellant next assigns as error that the military judge erred when he denied two defense motions to suppress[6] evidence of oral admissions made by appellant in an interview with two OSI agents. The bases for these motions were that appellant was not properly warned of the offense of which he was suspected before he was interrogated and that there was inadequate corroboration of his admissions by other evidence.

Mil. R. Evid. 305(c) implements Article 31(b), UCMJ and the well established constitutional principle that pretrial admissions of an accused are inadmissible at trial if he was interrogated without an adequate warning of the nature of the accusation against him. In this case the two OSI agents who interviewed appellant both testified they

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[6] Mil. R. Evid. 304, R.C.M. 905(b)(3).

warned him he was suspected of indecent acts and liberties with his stepdaughter. Appellant testified he was told only that he was suspected of "family abuse", which he understood to mean acts of violence. The military judge made detailed findings in which he resolved credibility issues against appellant and found he was properly warned he was suspected of indecent acts. In weighing the credibility of the parties, he noted the testimony of the two OSI agents was corroborated by interview notes taken by one of the agents and by an interview record form, both of which indicate appellant was warned that he was suspected of indecent acts and liberties with a child. After giving due consideration to the trial court's opportunity to personally observe the witnesses, and after reviewing all the relevant evidence of record, we adopt the military judge's findings as our own. We conclude appellant was properly warned of the nature of the accusations against him, and the military judge did not err in denying his motion to suppress appellant's pretrial admissions on this basis.

Mil. R. Evid. 304(g) provides that an admission of the accused may be admitted as evidence "only if independent evidence, whether direct or circumstantial, has been introduced that corroborates the essential facts admitted sufficiently to justify an inference of their truth. . . ." The independent evidence need only raise an inference of the truth of the essential facts admitted, but the amount and type of corroborating evidence is a factor to be considered by the finder of fact in determining the weight to be given the accused's admissions. The Court of Military Appeals has construed this provision liberally, characterizing the quantum of corroboration evidence required as "very slight". *United States v. Maio,* 34 M.J. 215, 218 n.1 (C.M.A. 1992).

The only admission by appellant that the defense moved to suppress at trial concerned an incident that was the

subject of a specification of which the members found him not guilty, and which is therefore moot. No motion was made at trial to suppress other admissions that relate to the remaining specifications. Since no objection was made to these other admissions, the issue of adequate corroboration was waived concerning them. Mil. R. Evid. 304(d)(2)(A); *United States v. Miller,* 31 M.J. 247, 251 (C.M.A. 1990).

Even if waiver did not apply, we conclude there was ample corroboration for appellant's admissions that related to the specificatinos of which he was convicted. His admission that he had the opportunity to commit the charged offenses because his wife slept in a separate room and his stepdaughter sometimes slept with him was corroborated by the testimony of his wife and the victim. His admission that he touched the victim's vaginal area was corroborated by the victim's testimony, although the two accounts vary considerably. The other statements of appellant that might be considered admissions are irrelevant to the offenses of which he was convicted. We conclude the military judge did not abuse his discretion in denying the motion to suppress appellant's pretrial admissions.

INSTRUCTIONS

Appellant also assigns as error that the military judge failed to instruct the members on the lesser included offenses of indecent exposure,[7] indecent acts with another,[8] and assault consummated by a battery.[9] The trial defense counsel did not request instructions on any lesser included offense, but R.C.M. 920(e)(2) requires the military judge

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[7] Article 134, UCMJ; MCM, Part IV, paragraph 88 (1984).

[8] Article 134, UCMJ; MCM, Part IV, paragraph 90 (1984).

[9] Article 128, UCMJ; MCM, Part IV, paragraph 54 (1984).

to instruct *sua sponte* on any lesser included offenses reasonably raised by the evidence. *United States v. Sellers*, 33 M.J. 364 (C.M.A. 1991); *cf. United States v. Strachem*, 35 M.J. 362 (C.M.A. 1992) (explicit waiver).

Appellant was convicted of three offenses. There is no argument that any lesser included offense was raised in connection with the first of the charged acts.

A second act charged as an indecent act with a child under 16 years of age occurred when appellant inserted his finger into his stepdaughter's vagina. Appellant argues the evidence raised the lesser included offenses of assault consummated by a battery and indecent acts with another. As to the former, the appellant denied intentionally touching the victim's vagina, although he said he might have inadvertently done so. Since assault consummated by a battery also requires an intentional touching, the evidence in this case fails to raise any offense involving an assault that would not also be an indecent act. The only element distinguishing the charged offense from indecent acts with another is the age of the victim, which is undisputed.

The third specification, charged as taking indecent liberties with a child under 16 years of age, alleged appellant exposed his penis to his stepdaughter and compelled her to look at it. Appellant now argues the evidence raises the lesser included offense of indecent exposure. The allegation that appellant forced the victim to look at his penis is not an essential element of the charged offense, which can be committed by indecent exposure to a child without any element of compulsion and without physical contact. MCM, Part IV, paragraph 87(c). The only element of the charged offense that is not also required for conviction of indecent exposure is that the victim is a child under 16 years of age, which was undisputed.

We conclude no lesser included offense was raised by the evidence. The military judge therefore did not err in

failing to instruct the members on any lesser included offense.

STAFF JUDGE ADVOCATE'S RECOMMENDATION

The staff judge advocate's post-trial recommendation to the convening authority[10] advised him there were no legal errors in the case, properly advised him of his responsibilities and authority for acting on the findings and sentence, and recommended the convening authority approve the sentence as adjudged. In its response,[11] the defense argued appellant was entitled to credit against the adjudged confinement because he was restricted to the island of Oahu before trial. Neither the defense counsel's submission nor appellant's separate letter specifies the date when this restriction began, but both say it lasted a year and a half. The addendum to the staff judge advocate's recommendation[12] indicates appellant was restricted to Oahu from August 1989 to the time of trial in April 1991. No mention of this issue was made at trial.

There is no indication there was any restraint on appellant's liberty more onerous than an order not to leave Oahu. This restriction is not the sort of pretrial deprivation of liberty that would be considered tantamount to confinement for which appellant would be entitled to credit against his sentence to confinement under R.C.M. 305(k). *United States v. Calderon,* 34 M.J. 501 (A.F.C.M.R. 1991); *United States v. Lassister,* 35 M.J. 832 (A.C.M.R. 1992). In any event, failure to raise it at trial waives the issue. R.C.M. 1001(b)(1).

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[10] R.C.M. 1106.

[11] R.C.M. 1106(f).

[12] R.C.M. 1106(f)(7).

Appellant now argues the addendum to the staff judge advocate's recommendation, which advised the convening authority the pretrial restriction issue was waived, was prejudicially deficient because it did not go on to remind the convening authority that he must nevertheless consider the period of time during which appellant was restricted to Oahu before trial as bearing on clemency. We disagree. The staff judge advocate's recommendation advises the convening authority he must consider all matters submitted by defense counsel or appellant bearing on clemency. The addendum repeats this advice. We do not regard the addendum's passage commenting on the lack of merit of the restriction as a mandatory sentence credit as raising any danger that the convening authority would assume he need not consider it as a clemency matter. We therefore find no error.

CONCLUSIONS

We have examined the findings, and we find them legally and factually correct. We have given individualized consideration to the appropriateness of the sentence, weighing the nature and seriousness of the offenses, the character and military performance of appellant, and all the circumstances documented in the record of trial. *United States v. Snelling,* 14 M.J. 267 (C.M.A. 1982). We find that the sentence, as adjudged and approved, is not inappropriate.

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